MOHD. TAZILI MOHD. SHAH

v.

MUHAMMAD HJ. AWANG

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[CIVIL SUIT NO. S7-22-226-90]
28 JANUARY 1992

CIVIL PROCEDURE: *Injunction - Application to set aside ex-parte interlocutory prohibitive injunction - Whether injunction granted by the Court proper - Plaintiff in no financial position to pay the damages suffered by the defendant and secured by the plaintiff's undertaking - Whether suppression of facts by the plaintiff at the material time when the original hearing of the said ex-parte application - Whether material.*

On 15 May 1990 the plaintiff obtained an *ex-parte* interlocutory injunction restraining the defendant by himself, his agents servants or representatives from harassing and interfering with the plaintiff's occupation and quiet enjoyment of premises (the disputed premises) until the final disposal of the suit.

At the hearing of the defendant's application to set aside the said injunction, it was contended that the plaintiff had failed to pay the deposit of RM40,000 towards the purchase price which he was obliged to do so upon execution of the sale and purchase agreement on 18 October 1988, the defendant was entitled to terminate that sale and purchase agreement which the defendant had done so.

The disputes between the parties arose from the execution of a sale and purchase agreement dated 18 October 1988 and 1 July 1989 that is (the October 1988) and (the July 1989) agreements respectively.

Inter alia it was alleged by the defendant that the plaintiff had no financial means to purchase the disputed premises or that the defendant had financed him in a business trading under the name of Geranium Supply and Services.

The issue before the Court is whether the interlocutory prohibition issued by the Court is a properly issued injunction upon considering the defendant's allegation that the plaintiff is in no position to pay the damages suffered by the defendant and secured by the plaintiff's undertaking.

Held:

[1] If damages in the measure recoverable under such undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them there would be no reason on this ground to refuse an interlocutory injunction.

[2] At the *ex-parte* hearing of the application for such an injunction all relevant facts must be laid before the Court and nothing suppressed. Now had the plaintiff revealed the aforementioned matters concerning the tenancy of the disputed premises the Court would most probably have refused to grant an injunction at the *ex-parte* hearing of the plaintiff, application for the same and required him to serve his application on the defendant first.

[The interim injunction granted to the plaintiff is revoked and damages suffered by the defendant must go for assessment by the Court. Costs to be borne by the plaintiff.]

Cases referred to:

American Cyanamid Co. v. Ethicon Ltd. [1975] 1 All ER 504 ***(foll)***
Re. R.N. (Infants) [1967] AC 572 ***(foll)***
Rex v. Kensington Income Tax Commissioners [1971] 1 KB 486 ***(foll)***

For the plaintiff - Darshan Singh; M/s. Darshan Singh & Co.
For the defendant - L.C. Loh; M/s. L.C. Loh & Co.

JUDGMENT

Lim Beng Choon J:

On 15 May 1990 the plaintiff obtained from me, on his *ex-parte* application (encl. 3), an interlocutory injunction restraining the defendant by himself, his agents servants or representatives from harassing and interfering with the plaintiff's occupation and quiet enjoyment of premises No. 209, Jalan H8, Melawati, Kuala Lumpur (the disputed premises) until the final disposal of this suit. On 31 May 1990 the defendant applied to set aside the injunction (encl. 6).

At the hearing of defendant's application to set aside the said injunction on 5 December 1990, his Counsel mainly contended that as the plaintiff had failed to pay the deposit of RM40,000 towards the purchase price which he was obliged to do so upon execution of the sale and purchase agreement on 18 October 1988, the defendant was therefore entitled to terminate that sale and purchase agreement which the defendant had done so. However as I was satisfied that the question as to whether the plaintiff had paid the said deposit could not be clearly determined at this interlocutory stage, I therefore, dismissed the defendant's application to set aside the said injunction. After my dismissal of the defendant's application, he, through his solicitors, wrote in to request for the matter to be adjourned to open Court for further argument (encl. 28). Upon my review of the matter, I felt that it would be proper to hear further arguments as apparently Counsel for the defendant had failed to raise a number of issues which should have been raised at the hearing on 18 October 1988. I, therefore, allowed the request of the defendant to hear further arguments.

The disputes between the parties arose from the execution of a sale and purchase agreement or to be exact two sale and purchase agreements dated 18 October 1988 and 1 July 1989 (the October 1988) and (the July 1989) agreements respectively.

The claims of the plaintiff as can be gathered from the several applications filed by him can very briefly be stated as follows:

The plaintiff claimed that he purchased the disputed premises from the defendant by virtue of the October 1988 agreement at a purchase price of RM135,000 and upon the execution or soon after the execution of the October 1988 agreement he paid the required deposit of RM40,000 to the defendant himself instead of paying it to the common solicitors M/s. Shariff & Som as provided in Clause 1 of the October 1988 agreement. The balance purchase price of RM95,000 was to be paid on or before 1l December 1988 which was subsequently extended to 1 October 1989 by the October 1989 agreement. The plaintiff applied to Malayan Banking Berhad for a bank loan to finance the purchase of the disputed premises and on 18 July 1989 the said bank approved his application. The said bank, however, required the defendant to execute an assignment of his rights in respect of the disputed premises in favour of the said Bank. The defendant duly signed the necessary papers with regard to this assignment. However the said Bank was not happy with the format of the assignment, and they wanted the defendant to execute a new assignment. Thereafter the defendant by letter dated 12

January 1990 informed the common solicitors that he would not sign any assignment in favour of Malayan Banking Berhad or any other documents to complete the sale and the said Bank was informed by the common solicitors about the defendant's refusal. On 21 February 1990 the defendant purported to terminate the October 1989 agreement and caused the electricity to be cut off. He also started to harass the plaintiff and his family to cause him to vacate the disputed premises.

The defendant's claims can also be very briefly stated as follows:-

The defendant denied having received the said deposit of RM40,000 and complained that as the plaintiff had failed to pay the said amount he was clearly in breach of Clause 1 of the October 1988 agreement and the defendant was entitled to terminate the said agreement as well as the July 1989 agreement. What is more important however is that the defendant alleged that the plaintiff was not only a man of straw but that he had swindled the defendant of some money when the latter was persuaded by him to enter into partnership in his sole proprietor business trading under the name of Geranium Supply and Services - see the defendant's affidavit in reply dated 24 July 1990 (encl. 21). As a result of the swindle, the defendant instituted a suit registered at Kuala Lumpur High Court Civil Suit No. D3-22-2013-89 against the plaintiff, as defendant thereto. The defendant also succeeded in obtaining two injunctions freezing the plaintiff's banking accounts up to a limit of a sum of RM51,000 until the plaintiff could deposit the said sum in Court or produce a bank guarantee of the said sum. The defendant also said in his affidavit in reply that the plaintiff had intentionally lied and misled the Court as to the payment of deposit and his tenancy of the disputed premises. He also alleged that the loan approved by Malayan Banking Berhad had since been withdrawn and that the plaintiff was in no position to pay for the disputed premises and the arrears of rental.

In response to the allegations of the defendant as stated in his affidavit in reply, the plaintiff filed in a further affidavit (encl. 23) on 1l September 1990 in which he denied that he was a tenant of the disputed premises. He also denied that he had no financial means to purchase the disputed premises or that the defendant had financed him in his business trading under the name of Geranium Supply and Services.

The issue of whether a plaintiff is properly issued with a interlocutory prohibitive injunction is well settled by the House of Lords in the case of *American Cyanamid Co v. Ethicon Ltd* [1975] 1 All ER 504. I need not set out the legal principles as enunciated by the Law Lords in that case except to state that one of the principles is stated as follows in p. 510 of the reported case:

> If damages in the measure recoverable under such undertaking would be an adequate remedy and the plaintiff would be **in a financial position to pay then** - there would be no reason on this ground to refuse an interlocutory injunction. (Emphasis is mine)

Applying the principle enunciated by the judgment in the *American Cyanamid's* case to the present case, it is to be noted that it is the defendant's allegation that the plaintiff is in no position to pay the damages suffered by the defendant and secured by the plaintiff's undertaking. He based his allegation on the following grounds:

(1) The plaintiff did not have the financial means to pay the said deposit of RM40,000. In fact it was the defendant who was financing the business of the plaintiff trading under the name of Geranium Supply & Services until the plaintiff "played" him out.

(2) The Court had since then frozen the plaintiff's bank accounts until he could deposit the sum of RM51,000 in Court or produce a bank guarantee for the said sum;

(3) The Court had since granted two injunctions against the plaintiff as 1st defendant, and the defendant as plaintiff in Kuala Lumpur High Court Civil Suit No. D3-22-2013-89 to freeze his bank accounts - see affidavit in reply of the defendant dated 24 July 1990 (encl. 21).

In reply to the defendant's allegation, plaintiff merely stated in his further affidavit of 1l September 1990 (encl. 23) that:

> I deny that I did not have the financial means or that the defendant has financed me in my business. The defendant is merely harassing me and the matter between us is still being litigated and the proceedings are pending.

The plaintiff then went on to state in the same affidavit:

> I aver that I have other sources who are willing to give me loan and I also have my own financial resources.

After a careful scrutiny of the evidence adduced on this point concerning the plaintiff's inability to satisfy the damages due under his undertaking should the defendant succeed in this action, I am fully satisfied that the defendant has established beyond reasonable doubt that the plaintiff is in no financial position to pay the said damages. I say so for three reasons:

(1) It is not disputed that under Civil Suit D3-22-2013-89 the defendant here alleged that the plaintiff owed him certain sums of money as a result of the former financing the latter in his business carried out under the trade name of Geranium Supply & Services. As a result of that suit the defendant (plaintiff in that suit) succeeded in obtaining two injunctions to freeze the latter's banking account until such time as he is able to deposit the said sum of money into Court or to furnish a bank guarantee of the same.

(2) If what the plaintiff said is true, that is, that he has other sources who are willing to give him loan then it amazes me that the plaintiff would allow the injunctions to remain particularly when it must affect his business. In fact the plaintiff had made an attempt to have the two injunctions removed but he was not successful in spite of his denial that the defendant was never at the material time involved directly or indirectly in his business under the trade name of Geranium Supply & Services. That being the case it is hard to accept the bare statement of the plaintiff that he had other sources who were prepared to give him loans when as he himself admitted that, to use his own words, "as I have since the injunction been unable to operate my office, meet my financial commitments." That being the case, I am not prepared to accept the plaintiff's bare assertions which are not supported by any concrete evidence.

(3) No doubt that the proceedings in the Civil Suit D3-22-2013-89 are pending litigation as stated by the plaintiff thereby suggesting that the issues in that Civil Suit have not been finally disposed of. However that may be, this Court is entitled to consider the facts as raised by the defendant in his affidavit-in-reply so far as they are relevant to the question of the plaintiff's financial standing to decide whether the plaintiff is in a financial position to honour his undertaking.

In the final analysis it cannot be gainsaid that the plaintiff is in no position to pay damages to the defendant should the latter succeed in the present case. The interim prohibition injunction is therefore revoked.

Another point governing the issue of an *ex-parte* interim prohibition injunction is that at the *ex-parte* hearing of the application for such an injunction all relevant facts must be laid before the Court and nothing suppressed see *In re R.N.* (*Infants)* [1967] AC 572 and *Rex v. Kensington Income Tax Commissioners* [1971] 1 KB 486 at p. 493.

Again applying the aforesaid principle to the present case, I am satisfied that the plaintiff has not been candid and I say so for these reasons:

(1) The plaintiff was in fact in possession of the disputed premises under an oral tenancy agreement and that he was at the material time in arrears of rental - see receipt issued to him by the plaintiff Exh. M6 annexed to the affidavit in reply of the defendant affirmed on 12 June 1990 (encl. 17).

(2) Indeed the plaintiff himself in his affidavit affirmed on 30 September 1989 in Civil Suit D3-22-2013-89 annexed as Exh. M3 to the defendant's affidavit encl. 21 admitted that he purchased the plaintiff's premises and was in arrears of rental.

(3) Furthermore by letter dated 22 August 1988 the plaintiff admitted payments of the said rental for two months.

Now had the plaintiff revealed the aforementioned matters concerning the tenancy of the disputed premises I would most probably have refused to grant the *ex-parte* interim prohibitive injunction or at least refused to grant an injunction at the *ex-parte* hearing of the plaintiff's application for the same and required him to serve his application on the defendant first.

For the above reasons I should therefore reverse my earlier decision made in chambers and revoke the interim prohibitive injunction granted to the plaintiff and the damages suffered by the defendant must go for assessment by the Court. Plaintiff should also bear the costs of these proceedings.

Also found at [1992] 2 CLJ 857